STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Per Curiam

ECHELON HOMES, LLC,

Plaintiff-Respondent,

v

CARTER LUMBER COMPANY,

Defendant-Petitioner.
/

Supreme Court Nos. 125994, 125995

Court of Appeals Nos. 243112, 243180

Oakland County Circuit Court
Case No. 01-029345-CZ

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AMICUS CURIAE BRIEF OF THE MICHIGAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER CARTER LUMBER COMPANY'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF RELIEF SOUGHT

The Michigan Bankers Association ("MBA") files this *Amicus Curiae* Brief in support of the Application for Leave to Appeal submitted by Defendant-Petitioner Carter Lumber Company ("Carter"). The Court of Appeals held, without regard for the plain language of MCL 600.2919a, that a person can be liable for statutory conversion if the person has constructive, not actual, knowledge of the fact that property was stolen, embezzled or converted. The MBA asks this Court to grant Carter leave to appeal and to reverse the Court of Appeals' decision and rule that the plain language of MCL 600.2919a requires that a person have actual knowledge of the stolen, embezzled, or converted nature of the property to be liable for statutory conversion.

QUESTION PRESENTED FOR REVIEW

Is constructive knowledge that property is stolen, embezzled, or converted sufficient to impose liability under MCL 600.2919a despite the absence of any reference to a constructive knowledge standard in the statutory text?

The Court of Appeals answered:	Yes.
The trial court answered:	No.
MBA answers:	No.

STATEMENT OF GROUNDS FOR APPEAL

This appeal arises out of the Court of Appeals' holding that despite clear statutory language to the contrary, constructive knowledge that property is stolen, embezzled, or converted is sufficient to impose liability under MCL 600.2919a for statutory conversion. That holding is clearly erroneous and will cause material injustice to hundreds of banks in Michigan. MCR 7.302(B)(5). In addition, the appeal "involves legal principles of major significance to the state's jurisprudence." MCR 7.302(B)(3). The Court of Appeals decision ignores the established distinctions between actual and constructive knowledge—the ramifications of which apply to every statute requiring knowledge as an element of liability.

STATEMENT OF FACTS AND PROCEEDINGS

The facts and proceedings in this case are fully presented by the parties' appellate pleadings. The MBA's interest in the actual versus constructive knowledge issue is summarized here.

The MBA is an association of Michigan financial institutions with over 2,300 branches located throughout the state with combined assets of over $178 billion.[1] The 192 banks that make up the MBA employ more than 46,500 people and process thousands of checks and other financial transactions each day.[2] The Court of Appeals' decision in this case creates significant uncertainty for Michigan's banking industry because it creates an indeterminate duty to determine the use and application of funds beyond the standards established by the Michigan Legislature. MCL 440.3101-440.4504 (2004).

Banks are frequent targets of attempts to recover damages suffered as a result of embezzlement. A typical scenario involves an embezzlement of funds by a bookkeeper or other employee of a business. The employee embezzles funds by writing checks on the employer's bank account payable to the employee or in payment of the employee's debts. By the time the employer discovers the embezzlement, the employee has spent the money and the employer is able to recover only a pittance from the employee. Consequently, the employer tries to recover from anyone who handled or received the funds, including the employer's bank.

The Michigan Legislature has enacted Articles 3 and 4 of the Uniform Commercial Code ("UCC") to balance the rights of bank customers with the burdens imposed on banks to efficiently handle negotiable instruments including checks for collection or payment.

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[1] http://www.mibankers.com/About/aboutmba.htm

[2] http://www.mibankers.com/About/aboutmba.htm

For example, the Legislature has divided the obligation for verifying that items debited from a customer's account are properly payable between the bank and the customer. When a bank provides customers with a statement of account, the bank must also make available "items paid or provide information in the statement of account sufficient to allow the customer to reasonably identify the items paid." MCL 440.4406(1) (2004). Bank customers are, in turn, required to "exercise reasonable promptness in examining the statement" and "must promptly notify the bank of . . . relevant facts" concerning any unauthorized payments. MCL 440.4406(3). If the customer fails to report an unauthorized payment from the customer's account within one year of the bank providing the statement of account, the customer is precluded from asserting a claim against the bank. MCL 440.4406(6).

The Court of Appeals' decision below circumvents the Legislature's allocation of risk between banks and bank customers for payment of unauthorized or altered checks. Notwithstanding the preclusion created by MCL 440.4406, under the Court of Appeals' decision, a bank customer can sue a bank under MCL 600.2919a for aiding and abetting an embezzlement (by paying or accepting an unauthorized check) simply by alleging that the bank had constructive knowledge of the embezzlement. Actual knowledge is not required, and the bank customer avoids the one-year preclusion for suing for payment or receipt of unauthorized or altered checks. In fact, a law firm that failed to discover its employee was embezzling millions from it over a period of years has already asserted that its bank should be liable for treble damages under MCL 600.2919a because the bank allegedly had constructive knowledge of the embezzlement. (*See Carson Fischer, PLC v Standard Fed Bank*, Nos. 248125, 248167 pending before the Michigan Court of Appeals.) If the Court of Appeals' decision is permitted to stand, it will create years of commercial uncertainty for banks and their customers that will only be settled

after the courts have addressed myriad embezzlement scenarios on a case-by-case basis. In the meantime, banks will be forced to guess the appropriate standard and run the risk of treble damages and attorneys fees if they guess wrong. The Legislature has already eschewed this approach. The Court of Appeals interpretation of MCL 600.2919a should, accordingly, be reversed.

STANDARD OF REVIEW

This Court's review of statutory interpretation is *de novo*. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

ARGUMENT

I. MCL 600.2919a Requires Actual Knowledge of the Stolen, Embezzled, or Converted Nature of Property to Impose Liability.

The plain statutory language in Michigan Compiled Laws section 600.2919a requires proof that a person actually knows that property the person possesses is stolen, embezzled, or converted to impose liability. There is no language in the statute to suggest that constructive knowledge is sufficient to impose liability. Indeed, the Legislature's drafting of other statutes clearly shows that the Legislature did not intend to allow the imposition of liability under MCL 600.2919a upon a showing of constructive knowledge. This Court should enforce MCL 600.2919a as the Legislature wrote it.

A. MCL 600.2919a's plain language requires proof of actual—not constructive—knowledge to impose liability.

Under Michigan law, statutory construction starts by examining the statute's plain language. *People v Herron*, 464 Mich 593, 611; 628 NW2d 528 (2001). Where the language is unambiguous, courts presume the Legislature intended the meaning clearly expressed. *Id.* Further judicial construction is not permitted, and the statute must be enforced as written. *Id.* If a statute does not expressly define its terms, undefined statutory terms are given their plain and

ordinary meaning by consulting dictionary definitions. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 313; 645 NW2d 34 (2002).

Michigan Compiled Laws section 600.2919a states:

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.

The plain language of MCL 600.2919a is unambiguous: a party must **know** "that the property was stolen, embezzled, or converted" for liability to attach.

The ordinary meaning of "knowledge" is "[a]n awareness of or understanding of a fact or circumstance, a state of mind in which a person has no substantial doubt about the existence of a fact." *Black's Law Dictionary*, 888 (8th ed. 2004). The Court of Appeals recently explained that "[t]he term 'know' is defined as 'to perceive or understand as fact or truth; apprehend clearly and with certainty.'" *People v Nichols*, 262 Mich App 408, 413; 686 NW2d 502 (2004) (quoting *Random House Webster's College Dictionary* (1997)). Consequently, "to know" and "knowledge" connote "actual knowledge." *Id.* Accordingly, the plain language of MCL 600.2919a requires "actual knowledge."

The Court of Appeals failed to apply the plain language rule. Instead, the Court of Appeals, without any analysis of the text of MCL 600.2919a, asserted that "sufficient circumstantial evidence exists to create a question of fact regarding whether Carter had constructive knowledge" of the embezzlement. But "constructive knowledge" has an entirely different meaning than the "knowledge" required by MCL 600.2919a. "Constructive knowledge" is "[k]nowledge that one using reasonable care or diligence should have, and

therefore that is attributed by law to a given person." *Black's Law Dictionary*, 888 (8th ed. 2004); *see also Pincay v Andrews*, 238 F3d 1106, 1110 (CA9, 2001) (a party "is deemed to have constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud" (citation omitted)). This Court has explained that actual knowledge is not established by proof of constructive knowledge. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173; 551 NW2d 132 (1996).

Constructive knowledge is not a subset of "knowledge" but an entirely separate scienter imposing liability not only for what a person knows but also what a person "should have known." Reading a constructive knowledge standard into MCL 600.2919a lessens the standard for imposing liability from "awareness of" or "no substantial doubt about" the stolen nature of the property to whether the person should have reasonably ascertained that the property was stolen. Simply put, this lessened standard of culpability is contrary to the plain language of MCL 600.2919a.

By importing a constructive knowledge standard into MCL 600.2919a, the court disregarded this Court's dictate to strictly interpret statutes in accordance with their plain language. *E.g.*, *Herron*, 464 Mich at 611. This Court should grant Carter Lumber Company's ("Carter") application; reverse the Court of Appeals; and rule that MCL 600.2919a requires proof that a person has actual knowledge of the stolen, embezzled, or converted nature of property to be liable for statutory conversion.

B. The Legislature clearly expresses its intent to impose liability for constructive knowledge by using the terms "constructive knowledge" and "should have known."

The Michigan Legislature is fully aware of the significant difference between imposing liability because of "knowledge" and "constructive knowledge." When it intends to impose liability for constructive knowledge, it expressly refers to "constructive knowledge" as

such, or by the words "should have known." Thus, the Court of Appeals disregarded the plain language of MCL 600.2919a and should be reversed.

When the Legislature intends to impose liability based upon "constructive knowledge," it has specifically referenced "constructive knowledge" in the plain language of the statute. For example, in the Natural Resources and Environmental Protection Act, the Legislature has prohibited the Michigan Department of Environmental Quality from entering settlements for environmental remediation costs with any person who "purchased the real property with actual or **constructive knowledge** that the property was used for the generation, transportation, storage, treatment, or disposal of a hazardous substance." MCL 324.20134 (2004) (emphasis added). Likewise, in the Michigan Employment Security Act, the Legislature required that a person who is employed to assist an employee or agent of an "employing unit . . . shall be considered to be employed by that employing unit . . . provided that the employing unit had actual or **constructive knowledge** of the work." MCL 421.40 (2004) (emphasis added). *See also* MCL 445.1405 (criminal conduct by employees of housing contractors and financing agencies imputed to the contractors or financing agencies unless "the management of the contractor or financing agency had no actual or constructive knowledge of the wrongful conduct . . . ."); MCL 445.1567(2) (motor vehicle manufacturer must provide notice of termination to dealer within two years of having "first acquired actual or constructive knowledge of the [dealer's] failure" to comply with the dealer agreement); MCL 691.1572(2)(d) (providing immunity to individuals donating perishable food unless the donor "had actual or constructive knowledge that the food was tainted, contaminated, or harmful to the health or well-being of the recipient of the donated food").

As state and federal courts in Michigan have frequently noted, requiring proof of what a party should have known is the same as requiring proof of constructive knowledge. *See e.g.*, *Nichols*, 262 Mich App at 414; *S D Warren Co v Consumers Power Co*, No 241293, 2004 WL 1161451, at *1 (Mich App, May 25, 2004);[3] *People v Brady*, No 238736, 2003 WL 21675882, at *1 (Mich App, July 17, 2003); *Person v Wal-Mart Stores, Inc*, No 90-5454, 921 F2d 276; 1990 WL 212571, at *2 (CA6, Dec 20, 1990); *Arnold v Nat'l Steel Corp*, 95 F Supp 2d 685, 687 (ED Mich, 2000); *Lyles v Clinton-Ingham-Eaton Cmty Mental Health Bd*, 35 F Supp 2d 548, 551 (WD Mich, 1998).

Accordingly, the Legislature also clearly expresses its intent to adopt a constructive knowledge standard when it enacts statutes containing the phrase "should have known." For example, in MCL 691.1403, the Legislature limited government agency liability for highway defects to situations when "the governmental agency **knew, or in the exercise of reasonable diligence should have known**, of the existence of the defect . . . ."[4] MCL 691.1403 (2004) (emphasis added). And in the Persons With Disabilities Civil Rights Act, the Legislature permits a person with a disability to allege a failure to accommodate "only if the person with a disability notifies the person in writing of the need for accommodation within 182 days after the date the person with a disability **knew or reasonably should have known** that an

[3] All unpublished cases cited in this Brief are collected at Exhibit A.

[4] Echelon cites this Court's decision in *Peters v Michigan*, 400 Mich 50, 252 NW2d 799 (1977) applying MCL 691.1403, for the proposition that "this Court has endorsed the use of constructive knowledge on many occasions." Echelon fails to mention that this Court's "endorsement of the use of constructive knowledge" in *Peters* was the direct result of the Legislature's incorporation of a constructive knowledge standard into the plain language of the statute. The fact that this Court endorses the use of constructive knowledge when applying the plain language of statutes requiring constructive knowledge is unremarkable. Nor does it suggest that this Court has endorsed the use of constructive knowledge in statutes like MCL 600.2919a that do not contain language incorporating a constructive knowledge standard.

accommodation was needed. MCL 37.1210(18) (2004) (emphasis added). *See e.g.*, MCL 124.12a (2004) (quintupling penalties if a person or self-insurance pool "knew or reasonably should have known it was in violation of this act"); MCL 125.996 ("A manufacturer or dealer who knows or should have known that an alleged defect is covered by the warranty provided by this act and who willfully or by gross negligence refuses or fails to take appropriate corrective action may be liable for treble damages."); MCL 205.14(2)(d) (prohibiting the acquisition or sale of tobacco that the "person knew or should have known that the manufacturer intended the tobacco product to be sold or distributed outside the United States"). *See also e.g.*, MCL 324.3115(2); MCL 324.3313(4); MCL 324.5531(4), (5); MCL 324.30129(2)(a); MCL 338.1719(m); MCL 408.486(2); MCL 418.381(1); MCL 432.226; MCL 445.2503; MCL 451.810(e); MCL 500.150(1)(a); MCL 500.251(6)(a); MCL 500.1243(37); MCL 500.1244(1)(a); MCL 500.2038(1)(a); MCL 500.5112(2)(a); MCL 500.7074(a); MCL 550.54(c); MCL 550.528(2)(b); MCL 550.950(2)(a); MCL 550.1016(1)(a); MCL 550.1211a(8)(a); MCL 550.1929(1)(a); MCL 565.831(4); MCL 600.2948(1), (3); MCL 600.5706(1)(e); MCL 712A.18e(16); MCL 750.411t(7)(b); MCL 780.623(5).

The Legislature thus directly expresses its intent to impose a constructive knowledge standard in the plain statutory language. Unlike the statutes discussed above, MCL 600.2919a contains no reference to "constructive knowledge" or a "should have known" standard of liability. Instead, the plain language of MCL 600.2919a requires actual knowledge. The Court of Appeals erred by reading a constructive knowledge standard into the statute in the absence of statutory language to that effect. This Court should grant leave and reverse the Court of Appeals' decision.

II. The Court of Appeals' Substitution of a Constructive Knowledge Standard Into MCL 600.2919a is Anomalous.

A. Michigan courts have not substituted "constructive knowledge" for "knowledge" in other statutory contexts.

The Court of Appeals decision to substitute "constructive knowledge" for the statutory requirement of knowledge in MCL 600.2919a is unprecedented. The Michigan courts have not applied a constructive knowledge standard in other statutory contexts where the statutory text requires proof of knowledge.

But, relying upon *People v Tantenella*, 212 Mich 614; 180 NW 474 (1920), Echelon conflates "constructive knowledge" with proof of actual knowledge by circumstantial evidence to claim that "Michigan courts routinely use constructive knowledge to establish liability under the criminal counterpart to MCL 600.2919a." Constructive knowledge is, however, conceptually distinct from proof of actual knowledge by circumstantial evidence, as the definitions of constructive knowledge and circumstantial evidence show. As stated above, "constructive knowledge" is a degree of knowledge or scienter; "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Black's Law Dictionary*, 888 (8th ed. 2004). "Circumstantial evidence," however, relates to how something may be proven, and is "evidence based upon inference and not on personal knowledge or observation." *Black's Law Dictionary*, 395 (8th ed. 2004). The concept that actual knowledge can be proven by circumstantial evidence is unremarkable and does nothing to support imposing guilt for constructive knowledge in the face of a statutory text requiring knowledge.[5]

[5] For this reason, all the cases cited by Echelon for the proposition circumstantial evidence can be used to prove actual knowledge are irrelevant and do not support the Court of Appeals' decision. *See People v. Clark*, 154 Mich App 772, 775; 397 NW2d 864 (1986); *People v Brown*,

The *Tantenella* decision stands for the proposition that guilty knowledge can be proven by direct and circumstantial evidence. 212 Mich at 620-21; *People v Blackwell*, 61 Mich App 236, 240-241; 232 NW2d 368 (1975). In *Tantenella*, the defendant was convicted of receiving and aiding in the concealment of a stolen car. 212 Mich at 615-616. The *Tantenella* court addressed whether there was sufficient evidence that the defendant had knowledge of the stolen nature of the car to support the conviction. The *Tantenella* court quoted from the Minnesota Supreme Court's decision in *State v Gordon* that "'Guilty knowledge . . . was not directly proved. In the nature of things, that is ordinarily impossible; nor is it necessary. The circumstances accompanying the transaction may justify the inference by the jury that the prisoner believed, and had received the goods on belief that they were stolen.'" *Id.* at 620 (quoting *State v Gordon*, 117 NW 483 (Minn, 1908)).

Although at one point the *Tantenella* court imprecisely used the phrase "constructive knowledge," a reading of the entire opinion makes clear that the Court was in fact referring to actual knowledge being proven by circumstantial evidence. The sentence in which the Court uses the phrase "constructive knowledge" itself shows the Court was describing circumstantial evidence of actual knowledge and not constructive knowledge as that phrase is used today: "Guilty knowledge means not only actual knowledge, but constructive knowledge, **through notice of facts and circumstances from which guilty knowledge may fairly be inferred**." Furthermore, the *Tantenella* court's subsequent review of the evidence it deemed

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126 Mich App 282; 336 NW2d 908 (1983); *People v. Wolak*, 110 Mich App 628, 632; 313 NW2d 174 (1981); *People v Lauzon*, 84 Mich App 201, 207-208; 269 NW2d 524 (1978); *Aetna Cas & Surety Co v Leahey Constr Co*, 219 F3d 519, 534, 536 (CA6, 2000); *Lewis v. State*, 573 So2d 713, 715 (Miss, 1990); *Spitzer v Commonwealth*, 353 SE2d 711 (Va, 1987); *Commonwealth v White*, 334 A2d 757 (Pa Super Ct, 1975); *People v Juehling*, 52 P2d 520 (Cal, 1935).

sufficient to affirm the defendant's conviction shows it was describing proof of actual knowledge by circumstantial evidence, not constructive knowledge. The *Tantenella* court recited the evidence from which the jury could infer guilty knowledge: the defendant drove the car hours after it was stolen; he drove it from Detroit where it was stolen to Chicago in the company of the probable thief; the license number and motor number were altered; the defendant's contradictory statements regarding his ownership of the car; and his possession of a fictitious bill of sale. *Id.* at 621-622. The evidence recited by the *Tantenella* court is not evidence of constructive knowledge but circumstantial evidence of actual knowledge. The evidence does not suggest that the court was attempting to imply that by the exercise of reasonable diligence, the defendant would have known the car was stolen.

In *People v Blackwell*, the Court of Appeals reached the same conclusion. The *Blackwell* defendant challenged a jury instruction that "[g]uilty knowledge means not only actual knowledge but also constructive knowledge through notice of facts and circumstances from which guilty knowledge may be fairly inferred." 61 Mich App at 239. The *Blackwell* court determined that the jury instruction could be traced back to *Tantenella*. The court analyzed the instruction and stated:

> We agree with the defendant that the reference to constructive knowledge is needless and is probably an arbitrary distinction. . . . [I]t is apparent that the *Tantenella* Court and the others which have used the identical instructions since *Tantenella* used the term 'constructive knowledge' as a shorthand way of saying that this element of the charge may be proven circumstantially.

Id. at 240-241 (footnote omitted).

The two other cases that Echelon cites for the proposition a constructive knowledge standard suffices under a statute that requires "knowledge" both use the term "constructive knowledge" as shorthand for saying that actual knowledge can be proven by

circumstantial evidence. In *People v Gould*, 225 Mich App 79, 87; 570 NW2d 140 (1997), the court affirmed the defendant's conviction for child abuse based upon the defendant's admission that he shook a baby, because "knowledge can be inferred from one's actions." Likewise, in *People v. Scott*, 154 Mich App 615, 616; 397 NW2d 852 (1986), the court applied the constructive knowledge shorthand from *Tantenella* to determine that there was sufficient circumstantial evidence for a jury to find that the defendant had actual knowledge.

Consequently, substituting constructive knowledge for knowledge in MCL 600.2919a is not justified by the Michigan courts' analysis of other similar statutes.

B. Other courts have required proof of actual knowledge to impose liability for aiding and abetting.

The requirement that a party show actual knowledge to impose liability under MCL 600.1219a is by no means unique. States that have based civil liability for aiding and abetting on Section 876(b) of the Restatement of Torts (Second) have required "actual knowledge of the primary party's wrongdoing." *Aetna Cas & Surety Co v Leahey Constr Co*, 219 F3d 519, 534, 536 (CA6, 2000) (applying Ohio law); *Lawyers Title Ins Corp v United Am Bank of Memphis*, 21 F Supp 2d 785, 797 (WD Tenn, 1998) (applying Tennessee law). *See also Cent Bank, NA v First Interstate Bank, NA*, 511 U.S. 164; 114 S. Ct. 1439, 1450 (1994). Likewise, federal courts have required proof of actual knowledge of wrongdoing to impose liability for aiding and abetting under both the federal securities laws and the federal criminal law. *See e.g., Camp v Dema*, 948 F3d 455, 460 (CA8, 1991); *Harmsen v Smith*, 693 F2d 932, 943 (CA9, 1982); *Gould v Am-Hawaiian SS Co*, 535 F2d 761, 780-781 (CA3, 1976); *Sec & Exch Comm'n v Coffey*, 493 F2d 1304, 1316 (CA6, 1974). *See also Glidden Co v Jandernoa*, 5 F Supp 2d 541, 558 (WD Mich 1998) ("Actual knowledge is required to impose liability on an aider and abettor under New York law.").

The Court of Appeals' substitution of a constructive knowledge standard for aiding and abetting is thus unprecedented in Michigan and inconsistent with the standards for aiding and abetting adopted by courts of other jurisdictions. This Court should grant Carter's petition for leave and reverse the Court of Appeals' decision.

III. Substituting a Constructive Knowledge Standard Into MCL 600.2919a Undercuts the Legislature's Comprehensive Allocation of Risk Between Banks and Their Customers.

The Court of Appeals' decision below undercuts the comprehensive allocation of risk between banks and bank customers enacted by the Michigan Legislature. The Legislature has adopted Articles 3 and 4 of the UCC to govern negotiable instruments, bank deposits and collections. These statutes carefully delineate the responsibilities of banks and bank customers for detecting and preventing theft and embezzlement. By importing a constructive knowledge standard into MCL 600.2919a, the Court of Appeals has upset the Legislature's allocation of risk among banks and bank customers and has unsettled the reasonable commercial expectations that the Legislature's enactments created. The decision below should be reversed because it conflicts with the UCC as adopted by the Michigan Legislature.

The UCC governs claims arising from embezzlement, like that committed in the present case, that involve negotiable instruments including checks. Embezzlement schemes involving negotiable instruments typically fall into two types—those that involve instruments that are properly payable and those that involve instruments not properly payable. "An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank." MCL 440.4401(1). An instrument containing a forged signature or an alteration is not properly payable. MCL 440.3401(1); 440.4401(4)(a).

Section 3-307 of the UCC governs when an employer represented by a fiduciary can make a claim against a bank that accepts a properly payable instrument used by a fiduciary

(i.e., an employee) to embezzle funds. Specifically, the bank can be liable for the value of the instrument if it "has knowledge of the fiduciary status of the fiduciary,"[6] takes the instrument for payment or for value, and has notice of the breach of the fiduciary's duty to his or her principal. MCL 440.3307(2). Section 3-307 goes on to carefully delineate the circumstances under which the bank that takes an instrument will be considered to have notice of the fiduciary's breach of his or her duty. MCL 440.3307(2)(a)-(d). If the bank taking the instrument in payment from the fiduciary does not have notice of the breach of fiduciary's duties to the principal, the bank or person is entitled to claim to be a holder in due course, free from claims and defenses to the instrument. MCL 440.3302(1)(b); 440.3305(2).

The UCC likewise limits banks' liability for paying unauthorized items, including checks that may be used in embezzlement schemes. Section 4-406 of the UCC requires banks that provide account statements to customers to also make available items paid (cancelled checks) or provide the customer with enough information to identify items paid. MCL 440.4406(1). The customer is required to examine the account statement with reasonable promptness and notify the bank of any unauthorized payments. MCL 440.4406(3). Customers who do not discover and report unauthorized payments within one year after the account statement is made available are barred from asserting a claim against a bank for payment of an item with an unauthorized signature or alteration without regard for the care or lack thereof exercised by the customer or the bank. MCL 440.4406(6).

[6] For the purposes of the UCC, a person "'knows' or has 'knowledge' of a fact when he or she has actual knowledge of it." MCL 440.1201(25).

Thus, where an embezzlement scheme involves negotiable instruments including checks, the Michigan Legislature has established a detailed apportionment of risk between banks and their customers.

The Court of Appeals decision below undercuts commercial expectations established by the Legislature for banking transactions by imposing a duty of inquiry beyond that required by the UCC. The lessened scienter of constructive knowledge imposed by the Court of Appeals for statutory conversion imposes an undefined duty of inquiry on banks who take negotiable instruments for value. Unlike the UCC's carefully planned limits on liability, the Court of Appeals' misconstruction of MCL 600.2919a will result in piecemeal litigation to define the new apportionment of risk between banks and their customers. Not only will this result in expensive litigation, but banks will risk treble damages plus attorneys fees if they guess wrong on the appropriate level of care. The Legislature clearly did not intend to saddle banks with such uncertainty and significant risk. The Court of Appeals decision should, accordingly, be reversed.

CONCLUSION

For the foregoing reasons, constructive knowledge of the stolen, embezzled, or converted nature of property is not sufficient to impose liability under MCL 600.2919a. The plain language of the statute requires actual knowledge. Accordingly, Carter's petition for leave should be granted and the Court of Appeals substitution of a constructive knowledge standard for the actual knowledge required by MCL 600.2919a should be reversed.

Dated: January 3, 2005

By: _____

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

S.D. WARREN COMPANY, Plaintiff,
v.
CONSUMERS POWER COMPANY and Hydaker-Wheatlake Company, Defendants,
HYDAKER-WHEATLAKE COMPANY, Third-Party Plaintiff/Counter-Defendant,
and
CONSUMERS POWER COMPANY, Third-Party Plaintiff/Counter-Defendant-Appellant,
v.
KELLY SERVICES, INC, Third-Party Defendant-Appellee.

No. 241293.

May 25, 2004.

Before: METER, P.J., and WILDER and BORRELLO, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Defendant/third-party plaintiff Consumers Power Company (Consumers) appeals by right from the trial court's ruling that third-party defendant Kelly Services, Inc. (Kelly) did not have to indemnify Consumers from damages that occurred after Consumers utilized Kelly personnel to map the route on which a trench would be dug. Consumers claims that damages were caused to an underground structure because of the Kelly employee's negligence. Because we hold that the jury's finding that Consumers had constructive knowledge of the underground structure means as a matter of law that Consumers knew or should have known about the structure's existence--regardless whether the Kelly employee was negligent--we hold that there is no basis for determining the indemnity clause's scope. Thus, we affirm the trial court, albeit for different reasons. See MCR 7.216(A)(7).

I. Background

This is the parties' third appearance before this Court. To delineate the initial installment of the somewhat complex factual and procedural history of the case, we quote the following from our previous opinion, *S D Warren Co v. Hydaker-Wheatlake Co,* unpublished per curiam opinion of the Court of Appeals, issued February 6, 2001 (Docket Nos. 216208 and 216271):

> In these consolidated appeals, defendants Consumers Power Company (Consumers) and its subcontractor Hydaker-Wheatlake Company (Hydaker) appeal as of right from a judgment entered in favor of plaintiff S.D. Warren Company (plaintiff). The judgment was entered following a jury trial limited to the issue of damages on plaintiff's trespass claims against Consumers and Hydaker. In Docket Nos. 216208 and 216271, Consumers and Hydaker challenge the order granting plaintiff partial summary disposition of its trespass claims. In Docket No. 216208, third-party plaintiff Consumers contests the order denying summary disposition of its claim for indemnification against third-party defendant Kelly Services, Inc. (Kelly Services). We reverse and remand for proceedings consistent with this opinion.

I. Facts and Proceedings

A. Trespass

This case arises from an incident on September 1, 1993 in which Hydaker struck and damaged a portion of plaintiff's sewer line while installing an underground electrical line at Consumers' direction. Plaintiff operates a paper manufacturing facility (the mill) in Muskegon. The production wastes from the mill are sent to a municipal pumping station through a thirty-inch "force main" owned and maintained by plaintiff. The sewer line runs through property owned by the State of Michigan/Department of Natural Resources (State) and leased to the City of Muskegon (City) for recreational development. Plaintiff holds an easement to maintain and operate underground facilities in the portion of the property through which the sewer line passes. The instrument creating the easement was duly recorded in 1986 and identifies the grantee as "Scott Paper

Company," plaintiff's predecessor in interest.

*2 In July 1993, the City retained Consumers to install a power line through the leased property. To this end, Richard Heisser (a retired Consumers employee whom Consumers obtained pursuant to its contract for temporary personnel with Kelly Services) met with the City's Park Supervisor, Bernadette Young, to discuss the City's desired route of installation and method. Heisser completed a layout design and staked the path for installation.

On August 26, 1993, Consumers contacted "Miss Dig," a statutorily mandated organization created to receive notice of proposed excavation and to provide such notice to all registered utilities having underground facilities within proposed areas of excavation. MCL 460.705, MCL 707; MSA 22.190(5), MSA 22.190(7). "Miss Dig" disclosed the existence of a Marathon Oil pipeline in the planned excavation area; it did not disclose the existence or location of plaintiff's sewer line because the line was not registered with the organization. [FN1] The path of the sewer line was not identified by flags, stakes or markers.

> FN1. Consumers and Hydaker do not contest on appeal the trial court's ruling that while plaintiff could have, it was not required to register with "Miss Dig" because the statute only requires "public utilities" and not private companies to register.

In the meantime, Consumers had contracted with Hydaker to install the power line in the manner designed and specified by Consumers. On September 1, 1993, Hydaker struck and damaged plaintiff's sewer line during the course of installing the underground power line. Because the sewer line was not pressurized at the time of the incident due to unrelated repairs, members of Hydaker's work crew did not know that they had hit the line until the days following the incident. The mill cannot operate without the sewer line and was therefore shut down until the repairs were completed.

In 1996, plaintiff filed a complaint against both Consumers and Hydaker, seeking recovery for damage to its sewer line under theories of trespass and negligence. The trespass counts alleged that Consumers, without authority, directed and caused Hydaker to commit a trespass on plaintiff's easement that resulted in damage to its sewer line. The negligence counts alleged that Consumers and Hydaker failed to use reasonable care in determining whether there were underground structures in the path of proposed excavation; that they failed to provide notice to plaintiff, as the holder of an easement in property, that it was planning to dig on the easement; and that they failed to use due care to avoid damage to the sewer line. In its general allegations, plaintiff claimed that "the presence of the underground sewer line was visible on the surface due to the presence along the sewer line of an air and vacuum relief structure within approximately 160 feet, and a manhole within approximately 200 feet, of the location where the damage occurred." Consumers and Hydaker denied this allegation in their answers to the complaint.

Plaintiff filed a motion for partial summary disposition on the trespass claims pursuant to MCR 2.116(C)(10). Plaintiff argued that defendants were liable as a matter of law because it was undisputed that Hydaker, while acting on Consumers' behalf, intruded upon and damaged the sewer line without plaintiff's authorization. In support of its motion, plaintiff submitted responses to interrogatories in which Consumers admitted that it only corresponded with the City about the project and that neither entity notified plaintiff about the excavation plans.

*3 Consumers and Hydaker filed a response requesting dismissal of the trespass claims. They argued that plaintiff could not establish that they intended to commit a trespass without showing that they had actual or constructive notice of the sewer line. [FN2] Plaintiff responded by maintaining that their intentional entry on the property and the intentional acts committed thereon satisfied the intent requirement. [FN3] The trial court agreed with plaintiff and granted its motion for partial summary disposition, reserving the issue of damages for trial. In rejecting Consumers' and Hydaker's motion for reconsideration, the trial court concluded that while cases from other jurisdictions supported their position, "this Court determines Michigan law to be otherwise."

> FN2. Defendants maintained that they had contacted Miss Dig pursuant to state law and common practice to give notice of the excavation; that examination of the adjacent terrain revealed no indication of a hidden sewer line; and that the only facts alleged concerning notice was the existence of a manhole and pressure valve that were obscured by weeds.

> FN3. Plaintiff asserted that negligence was not required to establish liability in trespass and, even if it were, Consumers and

> Hydaker could not sustain that position because: (1) the easement for the sewer line was recorded with the register of deeds (2) the sewer line was located in a railroad right of way (a common place for pipelines) (3) the line was marked with protruding manholes and pressure valves (4) the City Engineer's Office and the County Wastewater Management System were aware of the sewer line, and (5) defendants would have been alerted to the presence of the sewer line had they looked around and made obvious inquiries.

B. Indemnification

Thereafter, the trial court granted Consumers and Hydaker leave to file a third-party complaint against the State and the City, alleging that they were entitled to indemnification for any judgment rendered in favor of plaintiff on the trespass claims. Consumers and Hydaker claimed that the City, as lessee in direct control of the property owned by the State, invited them onto property that was subject to plaintiff's easement and that the incident would not have occurred but for its direction or invitation. After extensive litigation, however, the parties stipulated on September 11, 1998, to dismiss the third-party complaint with prejudice and without costs. Neither the State nor the City are parties to this appeal.

On December 3, 1997, Consumers and Hydaker were permitted to amend the complaint to add Kelly Services as a third-party defendant. Consumers and Hydaker alleged that any damage to plaintiff's sewer line was caused by the negligence of Kelly Services employee Richard Heisser, and that Kelly Services was contractually obligated to indemnify them for any and all damages arising from the activities of its employees. [FN4] Both Consumers and Kelly Services filed motions for summary disposition pursuant to MCR 2.116(C)(10). The trial court initially granted Consumers' motion and denied Kelly Services' motion as to Consumers. [FN5] The trial court subsequently granted Kelly Services' motion for reconsideration and reversed its original decision.

> FN4. Consumers and Hydaker alleged that Heisser was involved in the design for the installation of the underground power line; that he provided an installation drawing and made site visits for the purpose of installing the power line; that although not specifically marked or registered with "Miss Dig," Heisser knew that there was an underground facility somewhere in the vicinity; and that this "active" negligence of Kelly Services, as opposed to Consumers' and Hydaker's "passive" negligence, proximately caused the damage to the sewer line.
>
> FN5. The trial court granted Kelly Services' motion as to Hydaker on the ground that it was not a party to the contract for temporary personnel.

Less than a week before trial, and as a result of the trial court's rulings on various motions in limine on the issue of plaintiff's comparative negligence, plaintiff moved to dismiss the negligence claims against Consumers and Hydaker and to limit trial to the issue to damages on the trespass claims. On the same date, Consumers filed a motion to dismiss the trespass claims on the ground that Richard Heisser was responsible for the damage to the sewer line, that he was not an employee of Consumers at any relevant time, and that Consumers could not be held vicariously liable for the intentional tort of trespass as a matter of law. The trial court granted plaintiff's motion, but denied Consumers' motion as untimely.

***4** Following a jury trial limited to the issue of damages related to the trespass claim, the jury returned a $548,134.03 verdict in favor of plaintiff. [*Id.*]

After our February 6, 2001 opinion was issued, Warren and Consumers returned to the lower court for a second trial, only to discover a difference of opinion regarding the scope of this Court's remand. Warren believed that retrial was to be held on the issues of both liability and damages, while Consumers read this Court's opinion as granting retrial on the issue of liability only. The trial court agreed with Warren, and Consumers appealed. This Court held that trial was to be held on the issue of liability only (Order granting immediate consideration, vacating trial court's order, and clarifying scope of new trial, Docket No. 236470, 9/10/01) and denied reconsideration.

Before proceeding to trial, Warren and Consumers stipulated that if the jury found that Consumers had either actual or constructive knowledge of Hydaker's underground sewer line, that would be equivalent to a finding that Consumers was liable for the damages. After the January 2002 trial, the jury, by way of a special verdict form, found that Consumers had constructive knowledge of the sewer line. Thus, on

April 22, 2002, the trial court entered a judgment on the verdict against Consumers for the original amount of $548,134.03 plus interests and costs, for a final amount of $813,458.18.

As noted in this Court's previous opinion, Consumers and Kelly filed cross-motions for summary disposition in 1998 on the issue of indemnity. In its first opinion and order, the trial court held that the indemnity clause in the general contract did not extend to damages caused by a Kelly-provided employee. Nonetheless, the trial court found that the indemnity clause in the purchase order did cover the damages at issue, and thus granted Consumers' motion for summary disposition.

Kelly moved for reconsideration. After considering the matter again, the trial court reversed its decision and held that the "the conflicts provision of the contract [ ] subordinated the purchase order to the contract," and that as such, the indemnity clause of the general contract prevailed.

Consumers now appeals the trial court's July 21, 1998 order granting Kelly's motion for reconsideration and dismissing Consumers' claim for indemnity.

II. Analysis

A trial court's decision regarding a motion for reconsideration is reviewed for an abuse of discretion. *American Transmission, Inc v. Channel 7 of Detroit, Inc,* 239 Mich.App 695, 709; 609 NW2d 607 (2000), citing *In re Beglinger Trust,* 221 Mich.App 273, 279; 561 NW2d 130 (1997). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v. Rickerson,* 240 Mich.App 223; 611 NW2d 333 (2000), citing *Schoensee v. Bennett,* 228 Mich.App 305, 314-315; 577 NW2d 915 (1998).

***5** To succeed on a motion for reconsideration, the moving party must demonstrate that the trial court made "a palpable error by which the court and the parties have been misled and show that a different disposition of the [preceding motion for summary disposition] would result from correction of the error." MCR 2.119(F)(3). The court rule has been interpreted to give a trial court unrestricted discretion in ruling on motions for reconsideration. *Sutton v. Oak Park,* 251 Mich.App 345, 405-406; 650 NW2d 404 (2002). The court may grant reconsideration "to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v. Bylenga,* 241 Mich.App 655, 659; 617 NW2d 368 (2000), citing *Bers v. Bers,* 161 Mich.App 457, 462; 411 NW2d 732 (1987).

But a trial court's judgment regarding contract interpretation is reviewed de novo by this Court, and the de novo review encompasses "whether the language of a contract is ambiguous and requires resolution by the trier of fact." *DaimlerChrysler Corp v G-Tech Professional Staffing,* ____ Mich.App ____; ____ NW2d ____ (Docket No. 241109, Dec. 23, 2003), slip op 2, citing *Klapp v United Ins Group Agency, Inc,* 468 Mich. 459, 463, 469, 480; 663 NW2d 447 (2003), and *Mahnick v. Bell Co,* 256 Mich.App 154, 159; 662 NW2d 830 (2003).

Nonetheless, we cannot reach the indemnity clause issue, because there is no adjudication of negligence on the part of Kelly. Despite the fact that Consumers utilizes the majority of its brief to argue why Kelly must indemnify it, we find that prior to consideration of the indemnity clause, there must be a finding that Heisser was negligent. Even assuming that Kelly must indemnify, which we do not decide, Kelly argues that the jury's decision that Consumers had constructive knowledge of the sewer line (which knowledge translated into liability for Consumers per the parties' stipulation) cannot be translated into a finding that Heisser was negligent as a matter of law. We agree.

Because the issue whether Heisser was negligent was not argued before or decided by the trial court or the jury, Consumers is requesting that this Court decide that because the jury determined that Consumers was negligent, Heisser was negligent. We decline to do so. Relying on trial testimony regarding Heisser's methodology of mapping the route, Consumers contends that because Heisser was the "only person who actually laid out the route for the new power line," a finding that Consumers had constructive knowledge of the underground structure necessarily meant that solely Heisser was negligent. We find that remand on the issue is inappropriate because of the jury's specific finding that Consumers had constructive knowledge. Constructive knowledge means that " '[i]f one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact...." ' *Foster v. Cone-Blanchard Machine Co,* 460 Mich. 696, 717; 597 NW2d 506 (1999), quoting Black's Law Dictionary (6th ed), p 314. Thus, the jury's finding that Consumers had constructive knowledge of the

pipeline meant as a matter of law that Consumers failed to exercise reasonable care to discover that there was a sewer line in the planned excavation route. [FN6] Therefore, because the jury determined that ultimate responsibility lay with Consumers, remand would be futile.

> FN6. Moreover, the parties dispute whether Consumers put Heisser in "responsible charge" of the engineering task of laying the route, which was forbidden by the contract. Consumers claims it did not put Heisser in responsible charge, thus raising the question how Consumers could attribute liability to Heisser while at the same time claiming he was *not* in responsible charge of the work. If Heisser was not in responsible charge, it seems Consumers would bear ultimate responsibility for his mistake. The internal inconsistency of Consumers' argument bolsters our conclusion that Consumers bore ultimate responsibility for the mistake.

***6** In sum, we find it unnecessary to decide whether the trial court's ruling regarding the indemnity clause was correct because there was no determination at any stage of the lower court proceedings that Heisser, and thus Kelly, was negligent. Thus, we affirm the trial court's judgment in Kelly's favor for the reasons stated in this opinion.

2004 WL 1161451 (Mich.App.)

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
James William BRADY, Defendant-Appellant.

No. 238736.

July 17, 2003.

Before: FITZGERALD, P.J., and HOEKSTRA and O'CONNELL, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Defendant appeals as of right his jury trial convictions of operating a motor vehicle while under the influence of intoxicating liquor (OUIL) causing death, M.C.L. § 257.625(4), negligent homicide, M.C.L. § 750.324, and failure to stop at the scene of a serious personal injury accident, M.C.L. § 257.617. The trial court sentenced defendant to concurrent terms of imprisonment of 8 to 15 years' for the OUIL causing death conviction, 12 to 24 months' for the negligent homicide conviction, and 30 to 60 months' for the failure to stop conviction. We affirm.

Defendant first argues that there was insufficient evidence to convict him of failure to stop at the scene of a serious personal injury accident because there was no evidence that defendant knew that the victim was seriously injured. We disagree.

"In deciding whether there was sufficient evidence to support a conviction, this Court should view the evidence in a light most favorable to the prosecution and decide whether any rational fact-finder could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v. Shipley*, 256 Mich.App 367, 374-375; 662 NW2d 856 (2003). MCL 257.617 requires the prosecutor to prove that the defendant knew or had reason to believe that serious injury or death resulted from the accident in which he was involved. *People v. Lang*, 250 Mich.App 565, 572; 649 NW2d 102 (2002). This statute

> plainly contemplates finding a driver liable not only on the basis of his actual knowledge of the nature of an accident, but also on the basis of the driver's constructive knowledge-what the driver reasonably should have known given the circumstances surrounding the accident. Accordingly, no driver could escape liability merely by attempting to remain wilfully ignorant of the nature of the consequences of an accident. [*Id.* at 576.]

Here, while increasing speed and attempting to pass a semi, defendant lost control of the vehicle he was driving and hit a fence, knocking down several fence posts and shattering the vehicle's windshield. Defendant had a cut on his forehead. One passenger complained of hand and back pain, another was "bleeding pretty bad" and told defendant to call "911." One of the passengers requested that they go to the hospital. Further, two of the passengers testified that the victim, normally a talkative person, either was not talking or was repeating an obscenity. Despite defendant's testimony to the contrary, the surviving passengers indicated that they did not remember or did not think that defendant inquired whether everyone was alright. On this record, sufficient evidence existed to support defendant's conviction.

Defendant next argues that several instances of prosecutorial misconduct denied him a fair trial. We review de novo claims of prosecutorial misconduct. *People v. Pfaffle*, 246 Mich.App 282, 288; 632 NW2d 162 (2001). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v. Rice (On Remand)*, 235 Mich.App 429, 434; 597 NW2d 843 (1999).

*2 Two of defendant's alleged instances of prosecutorial misconduct were preserved by objections and we will address those first. Defendant claims that he was unfairly prejudiced when the prosecutor asked him if he did not tell his wife about having a girlfriend because the relationship was not serious. While a prosecutor may not ask witnesses

questions on cross-examination that have no relevance to the case and are intended to degrade the witnesses, *People v. Whalen*, 390 Mich. 672, 685-686; 213 NW2d 116 (1973), witness credibility is a material issue, *People v. Mills*, 450 Mich. 61, 72; 537 NW2d 909, modified 450 Mich. 1212 (1995), and may be impeached on cross-examination by questions about specific conduct regarding truthfulness, MRE 608(b). To the extent the prosecutor's question in the present case may have been improper, it did not deny defendant a fair and impartial trial where it addressed issues raised by defense counsel, *People v. Schutte*, 240 Mich.App 713, 721; 613 NW2d 370 (2000), and did not make defendant look any more dishonest than the lies defendant admitted to telling police. Moreover, the trial court's instructions to the jury indicating that attorneys' questions to witnesses are not evidence dispelled any prejudice. *People v. Bahoda*, 448 Mich. 261, 281; 531 NW2d 659 (1995).

Defendant also claims that the prosecutor shifted the burden of proof to him by erroneously informing the jury that it could not draw inferences from the evidence. However, when viewing the prosecutor's closing argument in its entirety, it appears that the prosecutor urged the jury to reach logical conclusions from the facts as opposed to mere supposition. Moreover, "once the defendant advances ... a theory, arguments with regard to the inferences created does not shift the burden of proof" to the defendant. *People v. Godbold*, 230 Mich.App 508, 521; 585 NW2d 13 (1998). Thus, the prosecutor's comment did not shift the burden to defendant in the case at hand. Moreover, the trial court's instructions to the jury, including to disregard statements of law made by attorneys that conflict with the trial court's instructions and that circumstantial evidence requires inferences to be drawn from other facts, cured any purported prejudice. *Bahoda, supra; People v. Graver*, 252 Mich.App 349, 358-359; 651 NW2d 818(2002).

The remaining alleged instances of prosecutorial misconduct were not objected to below, and thus our review of these unpreserved claims is for outcome-determinative plain error. *Pfaffle, supra;* see also *People v. Carines*, 460 Mich. 750, 763-764; 597 NW2d 130 (1999).

Defendant claims that he was denied a fair trial when the prosecutor told the jury that a police officer did nothing wrong because defendant's blood alcohol content ultimately was admitted as evidence. The record reveals that the challenged comments were made in response to defense counsel's closing argument. "Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel." *Schutte, supra.* Moreover, defendant failed to object below, and any error could have been cured by a timely instruction. *Schutte, supra* at 721-722. Defendant has not shown outcome-determinative plain error. *Carines, supra.*

***3** Defendant also claims that the prosecutor made a number of statements about the medical examiner's testimony that were not supported by the record and mischaracterized expert testimony. We find no error. The prosecutor's statements were supported by facts in evidence and a prosecutor may argue the evidence and draw reasonable inferences from testimony. *People v. Kelly*, 231 Mich.App 627, 641; 588 NW2d 480 (1998).

Defendant also argues that while each of these purported errors, standing alone, may not require reversal, their cumulative effect denied defendant a fair trial. Generally, the cumulative effect of individually harmless errors warrants reversal if it was so seriously prejudicial that it denied the defendant a fair trial. *People v. Knapp*, 244 Mich.App 361, 388; 624 NW2d 227 (2001). However, to the extent that there may have been prosecutorial error, it was cured by instruction. Defendant was not denied a fair trial.

Defendant next argues that the trial court abused its discretion in permitting the medical examiner to testify as an expert regarding the physiological effects of alcohol. We disagree. We review for an abuse of discretion a trial court's decision to qualify a witness as an expert and to admit that testimony. *People v. Murray*, 234 Mich.App 46, 52; 593 NW2d 690 (1999). "An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling made." *Id.*

In the present case, we cannot say that the trial court abused its discretion. The expert is a medical doctor, albeit a pathologist. Arguable deficiencies in the expert witness' expertise as applied to physiological effects of alcohol in living people might have been relevant to the weight of his testimony, but such considerations did not preclude its admission. Cf. *Woodruff v USS Great Lakes Fleet, Inc*, 210 Mich.App 255, 259-260; 533 NW2d 356 (1995) (gaps in the expertise of an expert witness were relevant to the weight of the testimony, not to its

admissibility).

Finally, defendant argues that resentencing is required due to errors in the scoring of the legislative sentencing guidelines. "This Court shall affirm sentences within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence." MCL 769.34(10); *People v. Leversee*, 243 Mich.App 337, 348; 622 NW2d 325 (2000). The sentencing court has discretion in determining the number of points to be scored, provided that there is evidence on the record that adequately supports a particular score. *People v. Hornsby*, 251 Mich.App 462, 468; 650 NW2d 700 (2002).

Defendant claims that offense variable (OV) 8 was incorrectly scored fifteen points for transporting the victim to a place of greater danger. According to defendant, this score was improper because the victim could not have been saved even if treated at the scene and the house was not a place of greater danger. However, we find that evidence in the record supports the trial court's scoring of OV 8, which concerns, as relevant to the present case, whether "[a] victim was asported to another place of greater danger or to a situation of greater danger." MCL 777.38(1)(a). Defendant drove the victim from the accident scene where somebody had stopped to see if they were alright and took him to a house where, according to one witness, there was no phone. Further, defendant at first refused to call "911" on his cell phone, despite the pleas of that witness. See *People v. Spanke*, 254 Mich.App 642, 648; 658 NW2d 504 (2003).

***4** Defendant next argues that prior record variable (PRV) 7, which concerns subsequent or concurrent felony convictions, M.C.L. § 777.57(1), was incorrectly scored at twenty points. According to defendant, his convictions of OUIL causing death, M.C.L. § 257.625(4), and negligent homicide, M.C.L. § 750.324, violate his federal and state constitutional rights to not be twice placed in double jeopardy. We disagree in both instances, and thus conclude that there was no error in the scoring of PRV 7.

A double jeopardy challenge is a question of law that we review de novo. *People v. Kulpinski*, 243 Mich.App 8, 12; 620 NW2d 537 (2000). Defendant's federal double jeopardy rights were not violated because each of the offenses for which defendant was convicted requires proof of an element that the other does not. *Blockburger v. United States*, 284 U.S. 299, 304; 52 S Ct 180; 76 L.Ed.2d 306 (1932); *People v. Denio*, 454 Mich. 691, 707; 564 NW2d 13 (1997); cf *Kulpinski, supra* at 15-16, 23. See M.C.L. § 257.625(4); MCL 750.324. Nor were defendant's state double jeopardy rights violated because the two statutes are intended to prohibit conduct affecting distinct societal norms. Cf *Kulpinski, supra* at 10-24; *People v. Ayers*, 213 Mich.App 708, 716-721; 540 NW2d 791 (1995).

To the extent that defendant further claims that PRV 7 was improperly scored because his conviction of failure to stop at the scene of a serious personal injury accident, M.C.L. § 257.617, should have been dismissed for insufficient evidence, and because the negligence homicide conviction must be vacated on double jeopardy grounds, our previous conclusions concerning these arguments render defendant's instant argument concerning PRV 7 without merit.

Affirmed.

2003 WL 21675882 (Mich.App.)

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NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Brenda PERSON and Arthur Person, Plaintiffs-Appellants,
v.
WAL-MART STORES, INCORPORATED, Defendant-Appellee.

No. 90-5454.

Dec. 20, 1990.

On Appeal from the United States District Court for the Western District of Tennessee, No. 88-01130: James D. Todd, J.

W.D.Tenn.

AFFIRMED.

Before KEITH and BOGGS, Circuit Judges, and CONTIE, Senior Circuit Judge.

PER CURIAM.

**1 Plaintiffs-appellants, Brenda Person and Arthur Person, appeal the district court's grant of summary judgment to defendant-appellee, Wal-Mart Stores Incorporated, in this slip and fall diversity action.

I.

On April 29, 1988, plaintiff-appellant, Brenda Person, entered the Wal-Mart store in Jackson, Tennessee, for the purpose of shopping. Plaintiff slipped and fell in the chemical aisle, alleging that there was an unidentified foreign substance on the floor which caused her fall. The store manager, Terry Goodwin, inspected the scene of plaintiff's fall after it happened and alleged that he found only a single drop of water on the floor that he was able to remove with his fingertip.

Plaintiffs, Brenda and Arthur Person, filed a negligence suit against defendant in the circuit court of Madison County, Tennessee on June 10, 1988. On July 19, 1988, defendant removed the action to the Federal District Court for the Western District of Tennessee.

On November 6, 1989, Wal-Mart filed a motion for summary judgment. By agreement of the parties and order of the court, the time within which plaintiffs were to respond to defendant's motion was extended through February 15, 1990. On February 21, 1990, the district court granted defendant's motion for summary judgment. Plaintiffs timely filed this appeal.

II.

The first issue this court must decide is whether the district court erred in concluding that there was no question of material fact concerning defendant's actual or constructive knowledge of the presence of a foreign substance on its floor.

Although a dispute existed as to whether there was, in fact, an unidentified foreign substance on the floor where Mrs. Person allegedly fell, for the purpose of the summary judgment motion, the district court assumed that there was an unidentified foreign substance present on the floor. This fact is therefore not an issue in this appeal.

Under Tennessee law, "[b]efore an owner or operator of premises can be held liable for negligence in allowing a dangerous or defective condition to exist on its premises, it must have (1) been created by the owner or operator or his agent, or (2) if the condition was created by someone other than the owner or operator or his agent, there must be actual or constructive notice on the part of the owner or operator that the condition existed prior to the accident." *Jones v. Zayre, Inc.*, 600 S.W.2d 730, 732 (Tenn.App.1980); *see also Simmons v. Sears, Roebuck and Co.*, 713 S.W.2d 640, 641 (Tenn.1986).

Plaintiff alleges that there is a question of material fact, which a jury must decide, about whether Wal-

Mart had actual or constructive notice that the condition allegedly causing Mrs. Person's fall existed prior to the accident. Because Cecil Walker, a maintenance worker employed by defendant, performed a safety sweep thirty minutes before plaintiff's fall and David Brasher, the department manager for the chemical department, stated that he had been in and out of the chemical department aisle the entire morning of the fall, plaintiff alleges that Wal-Mart had constructive notice that a foreign substance was on the floor.

**2 Defendant argues and the district court held that there is no evidence about the length of time "the substance" had been on the floor. Plaintiffs maintain that from the following facts, inferences can be drawn to establish that defendant had constructive knowledge of a foreign substance on the floor: (1) maintenance personnel were not observed in the area after 7:00 a.m., (2) there were other staff (Cecil Walker and David Brasher) in the area who might have seen the substance on the floor, and (3) defendant has a procedure for cleaning up spills as soon as possible. The district court concluded that none of the facts relied upon by plaintiffs as circumstantial evidence of constructive notice were sufficient to support a reasonable inference that a foreign substance had been on the floor for such a length of time that defendant should have discovered it. A jury could only speculate about whether the presence of the substance had occurred seconds, minutes, or hours before the accident. Relying on *Self v. Wal-Mart Stores, Inc.*, 885 F.2d 336 (6th Cir.1989), the district court concluded that with no evidence of the length of time the dangerous condition existed, there was no evidence to show that defendant had either actual or constructive notice. Because plaintiff failed to present proof of specific facts showing that a genuine issue of material fact existed, summary judgment in favor of defendant was appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

We believe that *Self v. Wal-Mart Stores, Inc.* is dispositive of the present case. In *Self*, the court noted that Tennessee courts "have trended against these slip-and-fall cases and require more of a plaintiff now than they used to." 885 F.2d at 337. When liability for negligence is based on the defendant's constructive knowledge, the proof must show that the dangerous condition existed for such a length of time that the defendant knew, or in the exercise of ordinary care should have known, of its existence. *Id.* at 338. In *Self*, the plaintiff had slipped on spilled dog food, but "the deposition testimony of the plaintiff and his wife showed conclusively that they had no way of telling how much time had elapsed between the point at which the dog food was spilled and the point at which Mr. Self lost his footing on it." *Id.* at 339. As in *Self*, the plaintiffs in the present case have failed to present proof concerning how long the alleged hazard had been present.

Plaintiffs attempt to distinguish *Self* by pointing out that in *Self* there was no evidence that any employees had recently been in the area of the fall, whereas in the present case two employees testified in their depositions that they had been in the chemical department during the morning of Mrs. Person's fall. Plaintiffs argue that in two Tennessee cases, *Benson v. H.G. Hill Stores, Inc.*, 699 S.W.2d 560 (Tenn.App.1985) and *Henson v. F.W. Woolworth's Co.*, 537 S.W.2d 923 (Tenn.App.1974), the Tennessee Court of Appeals reversed a directed verdict for the defendant store in a slip and fall case, because there was evidence that an employee or employees in the are close to the spill either knew, or should have known, of the existence of a foreign substance on the floor. Plaintiffs allege that the present case is closer in its facts to *Benson* and *Henson* than it is to *Self*.

**3 We disagree. The facts of *Benson* and *Henson* are distinguishable from those of the present case. In *Benson*, two employees of the defendant were stationed a few feet from the injury at the entrance/exit vestibule of the store where customers exit after paying for purchases. 699 S.W.2d at 563. In *Henson*, there was evidence that the store manager passed the scene of the fall just a few minutes before the fall. 537 S.W.2d at 924. In contrast, in the present case there is no evidence that the location of store employees could support an inference that they could or should have seen an alleged spillage in time to take precautionary action. For these reasons, we find that the district court was correct in concluding that there was no evidence that any of defendant's employees were in a position to have detected a spill in time to prevent plaintiff's fall.

Plaintiffs also argue that this case falls within the "dangerous method of operation" category of cases. In *Worsham v. Pilot Oil Corp.*, 728 S.W.2d 19, 20 (Tenn.App.1987), the Tennessee Court of Appeals held "that the requirements of constructive notice [in slip and fall cases] may be met where a dangerous condition inside a self-service business is not an

isolated one but is reasonably foreseeable to the owner because the condition is established by a pattern of conduct, a recurring incident, or a general or continuing condition and an invitee suffers injuries as a result of the condition." Plaintiffs allege that David Brasher, the head of the chemical department, stated that large spills commonly occur in the chemical department in which Mrs. Person fell and that a safety manual and training for store employees on procedures for scouring the store to prevent accidents from spills create an inference of the existence of a dangerous condition that is common and foreseeable.

We find that these arguments are without merit. First, plaintiffs' characterization of Mr. Brasher's testimony is misleading. Mr. Brasher was asked whether there were more spills in the chemical aisles than in other areas of the store. He answered, "No, the chemical aisles is not the larger area of spills in the store, larger spills also happen in departments 02, 01 and sport [sic] goods." This statement does not support an inference that spills commonly or frequently occur in the chemical aisles. Second, the fact that a self-service store has safety procedures in order that employees will be aware of and immediately clean up spills does not support an inference that a dangerous condition exists. The existence of a typical and ubiquitous self-service store, such as Wal-Mart, does not in and of itself meet the requirements of the "dangerous method of operation" theory. *Grissom v. Wal-Mart Stores, Inc.*, No. 87-1002, slip op. (W.D.Tenn. August 29, 1989) ("there is no material evidence from which a jury could reasonably infer that Wal-Mart's self-service method of operation created a foreseeably hazardous condition on its premises"). For these reasons, we conclude that there is no question of material fact concerning defendant's actual or constructive knowledge of the presence of a foreign substance and therefore affirm the grant of summary judgment.

III.

**4 Finally, this court must decide whether this appeal is frivolous in light of this court's recent decision in *Self v. Wal-Mart Stores, Inc.* Defendant argues that this case is indistinguishable from *Self,* and therefore the appeal is frivolous.

We do not agree. As previously discussed, in *Self,* there was no evidence of any employee recently being in the vicinity where the fall occurred. In the present case, two employees were in the vicinity that morning--one thirty minutes prior to the fall. We do not believe that it was frivolous for plaintiffs to argue that *Self* should be construed narrowly, limiting it to its facts. Nor was it frivolous for plaintiffs to argue that *Benson* and *Henson,* which allowed inferences of constructive notice from circumstantial evidence concerning the location of store employees, to be construed broadly. For these reasons, the court does not deem this appeal frivolous and will not award double costs and attorneys' fees to defendant.

IV.

To conclude, the decision of the district court granting summary judgment to defendant is affirmed. Defendant's request for double costs and reasonable attorneys' fees is denied.

921 F.2d 276 (Table), 1990 WL 212571 (6th Cir.(Tenn.)) Unpublished Disposition

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